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BEFORE THE
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

**Harmonization with the United Nations Recommendations,
International Maritime Dangerous Goods Code, and International
Civil Aviation Organization's Technical Instructions**

Docket No. RSPA- 2002-13658 (HM-215E)

Comments of:

United Parcel Service, Inc.

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**Comments of:
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United Parcel Service, Inc. submits the following comments on behalf of its small package operations and its subsidiary, UPS Supply Chain Solutions (collectively referred to herein as “UPS”), in response to the Notice of Proposed Rulemaking: Harmonization with the United Nations Recommendations, International Maritime Dangerous Goods Code, and International Civil Aviation Organization's Technical Instructions, Docket No. RSPA– 2002–13658, issued by the Department of Transportation, Research and Special Programs Administration (“RSPA”) on December 3, 2002 (“HM-215E”).¹

UPS is the world's largest package distribution company and the world's largest express package and document delivery company. UPS delivers more than thirteen million documents and parcels every day worldwide for 7.9 million customers. Its airline is among the ten largest airlines in the United States, operating more than 1,500 flight segments per day in more than 600 domestic and international airports. UPS Supply Chain Solutions consists of several subsidiary business units, including UPS Capital, UPS Logistics Group, UPS Freight Services, UPS Mail Innovations, and UPS Consulting. These Comments refer most directly to the UPS small package operations, UPS Logistics, and UPS Freight Services.

SECTION-BY-SECTION COMMENTS

1. Proposed Revisions to 49 C.F.R. § 172.202(a)(5): RSPA proposes to revise the indication on shipping papers of the total quantity of hazardous materials. That revision apparently will retain the current exception for cylinders for Class 2 (compressed gases) that, as it relates to quantity, allows a shipping paper to show an indication of the total quantity of cylinders (*e.g.*, “10 cylinders”).² Less clear is whether RSPA intends shippers to retain the

¹ 67 Fed. Reg. 72,034 (2002).

² See *id.* at 72,070 (to be codified at 49 C.F.R. § 172.202(a)(5)).

ability to describe the quantity of gas in a cylinder in other ways (*e.g.*, as a statement of net or gross quantity) in addition to describing the total quantity of cylinders. Since that understanding has been the basis for misunderstandings with certain enforcement personnel, UPS requests that RSPA confirm in any subsequent notice that it intends to continue allowing shippers to identify the net or gross weight of gases in addition to simply identifying the total number of cylinders in a shipment.

RSPA also proposes to revise § 172.202(a)(5) to require an indication on a shipping paper of the number and type of packages. RSPA recognizes in the preamble that there may be costs associated with this proposed revision, but contends that HM-215E's proposed one-year transition period "should minimize" such costs.³ Specifically, RSPA estimates that the shipping paper revisions proposed by § 172.202(a)(5) will impose an estimated "Total First Year Annual Start Up Cost" of \$1,115,992.⁴

RSPA is correct to acknowledge that the proposed shipping paper revisions will be costly. However, the agency's cost estimates are entirely unrealistic. If proposed § 172.202(a)(5) requires UPS (and any other affected entity using a dedicated shipping paper) to replace its existing shipping papers with a new shipping paper design to accommodate this new requirement, the cost would be several million dollars: For example, in the year 2002, UPS incurred \$1.3 million in costs associated with producing its shipping paper. Thus, should RSPA adopt a Final Rule that necessitates a shipping paper re-design, the costs of printing only the UPS shipping papers for one year will very likely exceed the start-up costs RSPA estimates will be associated with proposed § 172.202(a)(5) for the entire industry. Additionally, the UPS small package hazardous materials shipping paper is fully integrated into a transportation system engineered to transport packages on an express basis. Thus, any change to the UPS shipping paper will not only require UPS to develop appropriate procedures addressing the new shipping paper requirements, but also will necessitate changes throughout the entire UPS small package system.

RSPA also fails to account adequately for the costs that proposed § 172.202(a)(5) will impose on small-businesses. In an effort to ensure maximum compliance with RSPA's existing requirements, UPS requires all shipping papers to be computer-generated. As such, any change in the shipping paper requirements will require UPS customers to secure new software to accommodate the new information on the new shipping paper forms. Indeed, RSPA acknowledges in the preamble to HM-215E that such changes to electronic shipping paper programs may be necessary.⁵ UPS estimates that such new software will cost a minimum of \$300. Therefore, for the 12,000 small-business shippers that contract with UPS for hazardous materials service, the costs of complying with RSPA's shipping paper revisions in this rulemaking alone would total approximately \$3,600,000.

Most troubling, however, is RSPA's continued failure to address (or even mention) the cumulative impact of its proposed revisions to shipping papers and related documents in this and other pending rulemakings. RSPA currently is considering drastic changes to shipping papers

³ *Id.* at 72,045.

⁴ *Id.* at 72,046.

⁵ *See id.* at 72,040.

and related forms in two other pending rulemakings – HM-228 (Revision of Requirements for Carriage by Aircraft, Docket No. RSPA-02-11654)⁶ and HM-232 (Security Requirements for Offerors and Transporters of Hazardous Materials, Docket No. RSPA-02-12064).⁷ The changes to documentation under consideration in these rulemakings include, *inter alia*, requiring shippers to provide written responses on transportation documents to inquiries about the hazardous characteristics of the shipment and requiring the hazardous material shipping paper to contain the names and addresses of the consignor and ultimate consignee.

UPS has submitted extensive comments to both dockets concerning the costs of such proposed revisions,⁸ and UPS hereby incorporates its comments to HM-228 and HM-232 as if expressly set forth herein. To avoid the enormous waste in resources that would result if regulated entities were required to revise their shipping papers multiple times in response to multiple rulemakings, RSPA should provide a single, delayed compliance date for *all* shipping paper revisions that the agency might finalize in this rulemaking, HM-228, or HM-232. Consequently, UPS requests that RSPA delay compliance with any shipping paper revisions finalized in HM-215E, HM-228, and HM-232 for one-year running from the date of the *last* revision finalized in those rulemakings.

2. Proposed 49 C.F.R. § 172.315 and Proposed Revisions to 49 C.F.R. § 172.301: Proposed § 173.315 will eliminate the requirement that an offeror must mark a package containing limited quantities with the proper shipping name, and instead will require an offeror to mark such a package with a hollow diamond containing the appropriate identification number. This proposed revision marks a reversal of the HMR's current marking requirements applicable to limited quantities of hazardous materials.⁹ Additionally, in a rulemaking devoted to harmonizing the HMR with international standards, proposed § 173.315 curiously has no analogue in either the ICAO Technical Instructions or the IMDG Code. Rather, both international standards state that a package containing limited quantities must be marked with the proper shipping name of the dangerous goods and corresponding UN number.¹⁰ Further, neither standard requires the proper shipping name or identification number to appear in a diamond marking. RSPA fails to provide any justification for deviating from both longstanding provisions of the HMR, the ICAO Technical Instructions, and the IMDG Code.

RSPA also has not explained the goals and objectives it seeks to accomplish through this new marking requirement, nor has the agency pointed to any evidence that the new requirement will have any beneficial impacts on safety. Indeed, practical concerns strongly weigh against the adoption of § 172.315 as drafted. The addition of a diamond-shaped marking would greatly stress the available space on packages containing limited quantities. Such packages tend to be rather small, and lack the surface area necessary to accommodate the additional markings proposed in HM-215E. For example, for a ground shipment of limited quantity of a Toxic Material in PGIII, both the proposed diamond/UN number marking and a hazard label would be required, as well as orientation arrows for liquids. For an air shipment, a package containing

⁶ See 67 Fed. Reg. 8,769 (2002).

⁷ See 67 Fed. Reg. 22,028 (2002).

⁸ See Document No. RSPA-2002-11654-17 (HM-228) and Document No. RSPA-2002-12064-145 (HM-232).

⁹ See 49 C.F.R. § 172.301(a)(1).

¹⁰ See ICAO Technical Instructions, Part 5, 2.4.1.1; IMDG Code, 3.4.5.1.

limited quantities would require: (i) diamond/UN number marking proposed in § 172.315; (ii) a hazard label; (iii) the air eligibility marking proposed in § 172.323, and (iv) the orientation arrows needed for liquids. Carriers also may require additional information, such as address labels and (in the case of UPS) multi-part shipping papers. The practical effect of such complex new markings will be confusion, not clarity. The change in marking requirements proposed here will present a significant training challenge for hazmat employees, since such packages will be similar in appearance to, but nevertheless different in application from, the limited quantity packages so marked in countries adhering to the European ADR convention.¹¹

For example, under ADR, limited quantity shipments may be offered without shipping papers for road transport. Thus good management practices dictate that air carriers train their employees to exercise vigilance against any package displaying such a marking. ADR limited quantities provisions present a further complication because the quantities of material permitted in either inner or outer packagings simply do not align with those authorized under either ICAO or the HMR. For these reasons, UPS has already established a ban on hollow-diamond markings to prevent the accidental upload of non-compliant ground packages into the air system. We believe that, RSPA's proposal to introduce the hollow diamond marking will promote confusion for shippers, carrier employees, and enforcement agents alike. When confronted with a package marked as proposed, a person will be unable to identify which limited quantity provisions it complies with – i.e., those in the HMR, ICAO, ADR.¹²

If RSPA intends to require packages containing limited quantities to be marked with the appropriate identification number, then it merely should revise 49 C.F.R. § 172.301(a)(1) to remove the following provision: “Identification numbers are not required on packages which contain only limited quantities, as defined in § 171.8 of this subchapter” If RSPA has a larger goal than simply assuring the identification number is displayed on a limited quantity shipment, that goal is not articulated. We believe that, as it stands, this notice lacks any justification to impose a new diamond-shaped marking that will produce untold confusion and consume a substantial portion of the small surface area available on a limited quantity package.

3. Proposed 49 C.F.R. § 172.323: In proposed § 172.323, RSPA proposes to adopt a new “air eligibility” marking similar to that adopted by ICAO in the 2003-2004 edition of the ICAO Technical Instructions.¹³ The new ICAO air eligibility mark provides that, from January 1, 2004, “packagings, including those used for limited quantities of dangerous goods, must be marked to indicate that the shipper has determined that the packaging meets the applicable air transport requirements.”¹⁴ Thus, under the Technical Instructions, the new air eligibility mark is an *indication* by the shipper that the *packaging* meets applicable air transport requirements. In the

¹¹ To illustrate the potential confusion that such a marking would generate, one need only compare the variation in sizes allowed for inner packagings. While a limited quantity shipment of Acetone under the HMR is restricted to a maximum inner package size of no more than 1 liter, ADR allows inner packages of up to 3 liters each. Clearly the meaning of the hollow diamond marking in ADR is significantly different from the identical marking proposed here. Matters are even more complicated when one realizes that under ICAO, the inner package for a limited quantity shipment of Acetone must not exceed 0.5 liter.

¹² Or, perhaps, Canada's TDG regulations, which employ a similar – but not identical – hollow diamond marking for the Canadian version of limited quantity shipments.

¹³ See 67 Fed. Reg. at 72,041.

¹⁴ ICAO Technical Instructions, Part 5, 2.4.12.

preamble to HM-215E, RSPA explains that the air eligibility mark it proposes in § 172.323 ostensibly would serve a similar purpose: “The marking would certify compliance with all applicable air transport package requirements”¹⁵

The certification language proposed in § 172.323, however, is not limited to an indication that the package complies with the HMR’s air transport package requirements. Rather, proposed § 172.323(a) states that the air eligibility marking “is a *certification* that the person offering the package into transportation has determined that it complies with the requirements *of this subchapter*.”¹⁶ The “subchapter” to which proposed § 172.323(a) refers is “Subchapter C,” which encompasses 49 C.F.R. Parts 171 through 178 – the entirety of the HMR.

As an initial matter, such a certification is superfluous: 49 C.F.R. § 172.204(a) currently requires a person offering a hazardous material for air transport to certify compliance with the HMR, including its packaging requirements. The ICAO Technical Instructions provide that the air eligibility mark serves as an indication, not a “certification,” that the packaging meets applicable air transport requirements. Presumably, ICAO included such indication language because the 2003 Technical Instructions’ documentation requirements already require a certification that the dangerous goods comply “with applicable international and national government regulations.”¹⁷ Given the HMR’s analogous certification requirement, RSPA should substitute similar “indication” language for the certification currently proposed in § 172.323(a).

By requiring all persons “offering the package into transportation” to certify the package’s compliance with the HMR, proposed § 172.323(a) also imposes a certification obligation on persons with no direct knowledge of a package’s preparation. RSPA broadly defines an offeror as any person “who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned by the HMR to the offeror.”¹⁸ Thus, proposed § 173.323(a), as drafted, could be construed as requiring all persons in the distribution cycle who perform an offeror function with respect to an air package to certify the package’s compliance with all provisions of the HMR. Such an obligation obviously will have unintended consequences on persons who perform an “offeror” function, but took no part in preparing the package for transportation (*e.g.*, a freight forwarder who merely “re-offers” the package for transportation, or a distribution facility that warehouses and then “re-offers” packaged goods). RSPA could not have intended proposed § 172.323 to sweep so broadly.

Finally, such a broad certification requirement flies in the face of RSPA’s interpretation of the shippers certification required by 49 C.F.R. § 172.204. With respect to that certification, RSPA has taken the position that, “[i]n order to properly certify a shipment, the person signing the certification must have *direct knowledge* that the materials are in proper condition for

¹⁵ 67 Fed. Reg. at 72,041.

¹⁶ *Id.* at 72,071 (to be codified at 49 C.F.R. § 172.323(a)).

¹⁷ ICAO Technical Instructions, Part 5, 4.1.6.1.

¹⁸ Formal Interpretation of Regulations Issued Under the Hazardous Materials Transportation Act, 55 Fed. Reg. 6758, 6760 (1990).

transportation and are properly classified, described, packaged, marked and labeled in accordance with the HMR and applicable international regulations.”¹⁹

The logic underlying RSPA’s interpretation of the shipper’s certification is directly applicable to the certification proposed in § 172.323: Only the person preparing the package for air transport will have *direct knowledge* that the package complies with the HMR’s packaging requirements.²⁰ However, proposed § 172.323(a) does not impose its obligations on the preparer of a package for air transport. Rather, the proposed rule requires “each person who offers for transportation or transports by aircraft” to mark the package, and imposes a certification obligation upon “the person offering the package into transportation.” It is self-evident that, if a person offering or transporting the package did not also prepare the hazardous materials for air transportation, then that person could not have the direct knowledge necessary to certify the package’s compliance with the applicable HMR requirements.²¹

Consequently, if RSPA determines to promulgate proposed § 172.323, then it should revise the proposed text to read as follows:

(a) *Air eligibility marking.* Except as otherwise specified in this subchapter, each person who ~~offers for transportation or transports~~ **prepares a hazardous material for transportation** by aircraft ~~a hazardous material~~ in a non-bulk package, including packages used for consumer commodities and limited quantities of hazardous materials, must mark the package to indicate that it meets the applicable **packaging** requirements for air transport. The marking is **an indication** that the person **preparing the hazardous material for air transportation** ~~offering the package into transportation~~ has determined that ~~it~~ **the package** complies with the **applicable packaging** requirements of this subchapter.

3. **Proposed Revisions to 49 C.F.R. § 173.220(e):** UPS supports RSPA’s proposed revisions to § 173.220(e). The amended text will eliminate potential confusion surrounding the transportation of internal combustion engines.

4. **Proposed 49 C.F.R. § 175.30(a)(5):** RSPA proposes to add a new subsection to the acceptance provisions of § 175.30(a) that will prohibit the acceptance of hazardous materials for transportation aboard an aircraft unless such hazardous materials are marked with the proposed

¹⁹ RSPA Letter of Interpretation from Thomas G. Allen, Senior Transportation Regulations Specialist, Office of Hazardous Materials Standards, to Gareth D. Pearce, Director, International Marketing, Dreyco, Inc. (June 24, 1998) (emphasis added).

²⁰ RSPA apparently recognizes this concept in the preamble to HM-215E: “[T]he *shipper* would be responsible for the application of the marking” and “for ensuring that the package meets the applicable air transport requirements.” 67 Fed. Reg. at 72,041 (emphasis added).

²¹ Similarly, RSPA should reconsider permitting someone other than the preparer of the package to physically place the air eligibility marking on the package. If the marking will act as a certification that the package meets the HMR’s packaging requirements for air transport, then RSPA should require the preparer of the package to physically apply the marking.

air eligibility marking.²² RSPA should clarify that this regulation will not prohibit the acceptance of packages marked as air eligible that do *not* contain hazardous materials.

Respectfully submitted, this 4 day of February, 2003.

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²² See 67 Fed. Reg. at 72,081 (to be codified at 49 C.F.R. § 175.30(a)(5)).